No. 95-1605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ and MARIO PEREZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS

Of Counsel:
CARTER G. PHILLIPS
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

EDWARD BUSTAMANTE *
1412 Lomas Blvd., NW
Albuquerque, NM 87104
(505) 842-0392
Counsel for Respondent Miguel Gonzales

ANGELA ARELLANES
P.O. Box 1784
Albuquerque, NM 87103
(505) 247-2417
Counsel for Respondent Orlenis Hernandez-Diaz

ROBERTO ALBERTORIO
P.O. Box 90851
Albuquerque, NM 87199
(505) 768-3917
Counsel for Respondent Mario Perez

* Counsel of Record

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QUESTION PRESENTED

Section 924(c) of Title 18 imposes prison terms on individuals who "during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm . . . ." It also provides that "the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried."

The question presented in this case is whether a federal court is required to order that a sentence imposed under Section 924(c) runs consecutively to a state sentence that the defendant already is serving for a state conviction based on the same underlying conduct, where the state sentence includes a firearm enhancement imposed by state law.

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STATEMENT OF THE CASE

The Government's statement of the case adequately frames the issues.

INTRODUCTION

18 U.S.C. § 924(c) is a federal criminal statute that imposes prison terms on individuals who use or carry firearms during and in relation to certain federal drug trafficking or violent crimes. It provides that those prison terms shall not "run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." Despite the fact that the statute makes no reference at all to *state* terms of imprisonment, and that the Section 924(c) prison terms are predicated on the commission of certain highly dangerous *federal* crimes, the Government's position is that the concurrent sentencing prohibition applies to both federal and state terms of imprisonment. That position cannot be sustained in light of the available evidence of Congress's intent—much of which is not addressed in the Government's brief at all.

The Government's analysis of the text of the statute, which focuses almost exclusively on the term "any," wholly ignores relevant contextual evidence. Specifically, other federal criminal statutes, including one that address concurrent sentencing issues, reveal—not surprisingly—that when Congress intends a federal criminal statute to apply to matters arising under state criminal law, it unambiguously says so by expressly referring to state law, not merely by using language such as "any." Congress's consistent practice in this regard and its failure to use similarly specific language in Section 924(c) demonstrates that the statute was intended to apply only to federal terms of imprisonment.

Moreover, the Government's position that Section 924(c) applies to *state* terms of imprisonment raises fundamental issues of federalism that are nowhere addressed

in the Government's brief. Under the Government's view, the concurrent sentencing prohibition in Section 924(c) broadly applies to *any* state prison term—for felonies as well as misdemeanors, for violent crimes as well as non-violent crimes, and for crimes that arose out of the same transaction as the Section 924(c) offense as well as for crimes that did not. Such a categorical requirement that Section 924(c) sentences be served consecutively to *all* state prison terms necessarily alters the traditional federal-state balance in enforcement of the criminal laws, particularly where the state and federal charges arose out of the same course of conduct. *Cf. United States* v. *Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995) ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a "change in the sensitive relation between federal and state criminal jurisdiction.") (internal quotation omitted). In addition, the prohibition on concurrent sentences preempts state sentencing law in cases where the federal charges are tried first and where state sentencing law would permit the subsequent state sentences to be imposed concurrently, even though there is no "clear statement" in the statute that such preemption was intended by Congress.

Congress, of course, has the authority to displace state criminal law in such a manner, but only if it makes its intent unmistakably clear in relevant statutes. In this case, Section 924(c) contains no such clear statement. Indeed, it makes no reference to state law at all. Since Congress is well aware of the clear statement requirement, the absence of any mention of state terms of imprisonment in the statute demonstrates that Congress intended for the concurrent sentencing prohibition to apply only to federal terms of imprisonment. In sum, the term "any" in the statute simply cannot carry the weight that the Government attributes to it.

SUMMARY OF THE ARGUMENT

I. The flaw in the Government's textual analysis of Section 924(c) is that it examines the term "any" in isolation from relevant contextual evidence, which demonstrates that Congress intended for Section 924(c) to apply only to federal terms of imprisonment. Under the "holistic" approach to statutory construction adopted by this Court, courts should not consider one word or provision in isolation, but should consider the context of the language, as well as other statutory contexts in which the same or similar wording has been used.

The Government's interpretation of Section 924(c) is inconsistent with three aspects of the statutory context, all of which demonstrate that when Congress intends a federal criminal statute to apply to state crimes or punishments, it unmistakably expresses that intent by referring to state law, not merely by using language such as "any." *First*, throughout the text of Section 924, Congress demonstrated that it could make clear its intent to include state law within the provisions of that statute by expressly referring to state law. *Second*, when Congress intends a criminal statute to apply to both federal and state subject matter, it does not merely use the term "any," but instead customarily uses the more precise phrase "*any federal or state*" to modify the relevant terms. *Third*, other sections of the Comprehensive Crime Control Act of 1984, the very legislation that added the critical language to Section 924(c), make unmistakably clear that federal terms of probation and supervised release are to run concurrently with federal *and* state terms of probation and supervised release.

When Section 924(c) is interpreted in light of these other statutes, Congress's failure in that section to use similarly specific language—*i.e.*, language that refers to state law—can only mean that it did not intend to require sentences imposed under that section to run consecutively to state sentences. Under the Government's

reading of Section 924(c), the language in these other statutes that specifically refers to state law is mere surplusage. At a minimum, this contextual evidence establishes that the language of Section 924(c) is ambiguous and should be read with lenity.

II. The Senate Committee Report accompanying the 1984 amendments to Section 924(c) confirms that Congress did not intend for that statute to apply to state terms of imprisonment. The Committee Report, which discusses in detail the purposes of the amendments to the statute, makes no mention of an intent to expand the concurrent sentencing prohibition. Instead, the Committee Report explains that the purpose of the amendments was to correct certain drafting problems and to overrule decisions of this Court that had narrowed the scope of the statute. The legislative history's silence with respect to the Government's alleged significant expansion in the statute is compelling evidence that no such expansion was contemplated or intended.

Moreover, another passage in the legislative history affirmatively indicates that Congress did *not* intend to expand Section 924(c) to state prison terms. The Report states that Congress intended the 924(c) sentence to be served *prior* to all other sentences. That sentence order specification precludes the Government's reading of Section 924(c), since it is impossible for a defendant to *begin* serving a Section 924(c) sentence *prior* to a preexisting state sentence.

III. The absence of any indication in the text of Section 924(c) that Congress intended for the statute to apply to state sentences should be dispositive in this case for the additional reason that Congress failed to satisfy applicable "clear statement" requirements. This Court consistently has held that it will not adopt a construction of a federal statute that preempts state law unless such displacement was the clear and manifest purpose of Congress. Even where a statute does not actually preempt

state law, this Court has imposed a similar clear statement requirement where Congress seeks to expand the role of the federal government vis-a-vis the states in an area of traditional state responsibility, such as enforcement of criminal laws.

The Government's interpretation of Section 924(c) would preempt and interfere with the operation of state sentencing law in certain situations, such as where a defendant is first tried and sentenced under Section 924(c), and subsequently tried and convicted on state charges. Under the Government's reading of Section 924(c)—which provides that the sentence under that section "shall [not] run concurrently with any other terms of imprisonment," including state prison terms, the state court would have to impose the state sentence consecutively to the Section 924(c) sentence, regardless of whether state law allowed or even commanded a different result. There is no indication in the statute—much less a clear statement—that Congress intended to preempt state sentencing law. Accordingly, this Court should not adopt a construction of the statute that would have that effect.

IV. Although respondents believe that the text of Section 924(c), interpreted in light of applicable clear statement requirements, and the legislative history demonstrate that Section 924(c) only applies to federal terms of imprisonment, at the very least the text is ambiguous. In these circumstances, where there is an ambiguity with respect to the ambit of the penalties imposed by a criminal statute, the rule of lenity requires that Section 924(c) be interpreted in respondents' favor.

ARGUMENT

SECTION 924(c) FORBIDS THE IMPOSITION OF A SENTENCE THAT RUNS "CONCURRENTLY WITH ANY OTHER TERM OF IMPRISONMENT," ONLY WHERE THE "OTHER TERM OF IMPRISONMENT" IS IMPOSED UNDER FEDERAL LAW.

A. Congress's Failure To Specify That Section 924(c) Applies To Terms Of Imprisonment Under State Law, Where It Has Expressly Referred To State Law In Other Parts Of The Same Statute And In Other Sections Of Title 18, Demonstrates That Section 924(c) Only Applies To Terms Of Imprisonment Imposed Under Federal Law.

The Government's analysis of the text of Section 924(c) essentially starts and ends with Congress's use of the term "any" in that section. In the view of the Government, Congress's use of that "broad[]" term indicated that Congress "necessarily intended to preclude concurrency" with state sentences as well as federal sentences." U.S. Brief 14-15; see also *id.* at 12 ("By using [the] expansive term [any] . . . Congress manifested its intent to reach . . . state terms of imprisonment.") The flaw in the Government's approach is that it examines the term "any" in isolation from all relevant contextual evidence,[1] which demonstrates

[1] The Government's analysis of the statutory context is limited to other features of Section 924(c)(1). For example, the Government points to the first sentence of Section 924(c)(1), which in describing the predicate crimes that trigger the statute expressly limits the phrase "any crime of violence or drug trafficking crime" to federal crimes. U.S. Brief 15-16. The Government suggests that Congress's express limitation of the term "any" to federal crimes in that sentence indicates "that it did not intend to restrict the provision at issue here in the same manner." *Id.* at 15.

The opposite conclusion, however, is equally (if not more) plausible. Since the first sentence of Section 924(c)(1) expressly provides that the additional firearms sentence is only triggered by certain *federal* crimes, a plausible reading of the concurrent sentencing prohibition is that the phrase "any term of imprisonment" is similarly limited to terms of imprisonment *under federal law*. This construction is an application of the doctrine of *ejusdem generis*, which provides that where general language follows an enumeration of specific items, the general language is construed as applying only to items akin to those enumerated. *See Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). Since Congress enumerated *federal* crimes as the only predicate acts that trigger the firearms sentence, the more general language of the concurrent sentencing prohibition should be construed as applying only to items "akin" to those enumerated in the first sentence, that is, only to *federal* terms of imprisonment.

that Congress meant for Section 924(c) to apply to federal terms of imprisonment only. Specifically, a comparison of Section 924(c) with other parts of Section 924, other sections of Title 18, and other parts of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2138-2139, that address concurrent sentencing issues reveals that when Congress intends a federal criminal statute to apply to matters arising under state criminal law, it unambiguously says so by expressly referring to state law. Congress's failure to do so in Section 924(c)—when it had precise statutory models that it routinely follows—demonstrates that it did not intend that statute to apply to state terms of imprisonment.

This Court repeatedly has emphasized that when interpreting the language of a statute, courts should not consider one word or provision in isolation, but should consider the context of the language, as well as other statutory contexts in which the same or similar wording has been used. See, *e.g.*, *Bailey* v. *United States*, 116 S. Ct. 501, 505-07 (1995); *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991). As this Court has stated:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

Smith v. *United States*, 508 U.S. 223, 233-34 (1993) (quoting *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)) (examining other subsections of Section 924 to construe the meaning of the word "use" in subsection 924(c)(1)). See also *Bailey*, 116 S. Ct. at 506 ("We consider not only the bare meaning of the word ["use"], but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context.") (internal quotations omitted). The language and structure of related statutes serve as important indicia of Congress's intent in employing particular words or phrases. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, ——, 114 S. Ct. 1732, 1736-37 (1994) (concluding that Congress did not intend to permit collateral attacks on prior convictions under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), in part because related federal statutes expressly permit repeat offenders to challenge prior convictions).

The Government's interpretation of Section 924(c) is inconsistent with three aspects of the statutory context, all of which demonstrate that when Congress intends a federal criminal statute to apply to state crimes or punishments, it unmistakably expresses that intent by referring to state law, not merely by using language such as "any."[2] First, throughout the text of Section 924, Congress demonstrated that it could and would make clear its intent to include state law within the provisions of that statute. See, *e.g.*, subsection 924(a)(5)(A)(ii)(II) (juvenile shall be sentenced to probation if "the juvenile has not been convicted in *any* court of an offense (including an offense under section 922(x) or a similar State law . . .)")

[2] The cases cited by the Government in which this Court expansively has interpreted the term "any" in federal statutes, U.S. Brief 12, are not to the contrary. None of those cases involved the question whether the term "any" encompassed *state*, in addition to federal, subject matter.

(emphasis added); subsection 924(e)(2)(A) (term "serious drug offense" means an offense under certain federal statutes or certain offenses under State law); subsection 924(g)(3) (imposing penalties for the interstate transfer of firearms with the intent to engage in conduct which constitutes various federal offenses or "violates any State law relating to any controlled substance . . ."). Thus, where Congress intended that a subsection include state offenses, it said so. Congress's failure to do so in Section 924(c) cannot be ignored.

Second, the Government's position that Congress's use of the term "any" in Section 924(c) necessarily indicates that Congress meant that statute to apply to federal and state terms of imprisonment is squarely at odds with Congress's customary use of more precise language to indicate that it intends a federal criminal statute to apply to both federal and state subject matter. Specifically, when Congress intends a criminal statute to apply to both federal and state subject matter, it does not merely use the inclusive term "any," but instead typically uses the more precise phrase *"any federal or state"* to modify the relevant terms.[3] These explicit references to *state* law leave no

[3] *See, e.g.*, 18 U.S.C. § 521(b), (d) (enhancing criminal sentence for offense committed by member of a "criminal street gang," where a member is defined as someone who, *inter alia*, has been convicted of *any Federal or State* felony offense involving violence); 18 U.S.C. § 596 (prohibiting the polling of members of the armed forces who execute ballots under *any Federal or State* law); 18 U.S.C. § 841(*l*) (excluding *any Federal or State* offenses pertaining to antitrust violations from crimes that make an individual an unlawful recipient of explosives); 18 U.S.C. § 921(a)(20) (excluding *any Federal or State* offenses pertaining to antitrust violations from crimes that make an individual an unlawful recipient of firearms and ammunition); 18 U.S.C. § 981(e)(4) (allowing property forfeited for certain crimes to be returned to financial institutions as restitution and set off against amounts recovered by the financial institutions in *any State or Federal* proceeding); 18 U.S.C. § 3077(3) (defining United States property within meaning of anti-terrorism statute to include property outside the United

doubt as to the statutes' application to both federal and state criminal systems. Accordingly, Congress's failure to use the customary "any federal or state" language in Section 924(c) is strong evidence that Congress did *not* intend for Section 924(c) to apply to state terms of imprisonment. Congress clearly knows how to draft statutes that apply to state terms of imprisonment, and declined to do so in Section 924(c).

The third relevant feature of the statutory context is other sections of the Comprehensive Crime Control Act of 1984, the very legislation that added the critical language to Section 924(c) concerning concurrent sentencing. In that *same* Act, Congress adopted two provisions (as part of the overhaul of the federal sentencing scheme) that make unmistakably clear that federal terms of probation and supervised release are to run concurrently with Federal *and* State terms of probation or supervised release. See 18 U.S.C. § 3564(b) ("A term of probation runs concurrently with *any Federal, State, or local* term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation.") (emphasis added); 18 U.S.C. § 3624(e) ("The term of supervised release . . . runs concurrently with *any Federal, State, or local* term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release.") (emphasis added). Congress's failure, in the *same piece of legislation*, to use similarly specific language in amending the concurrent sentencing prohibition of Section 924(c) can only mean that Congress did *not* intend to require that sentences imposed under that section run consecutively to state sentences. See *Custis* v. *United States*, 511 U.S. 485, ——, 114

States owned by *any Federal or State* governmental entity); 18 U.S.C. § 3523(b)(5) (authorizing guardian who enforces civil judgments against persons in federal witness protection program to initiate enforcement actions in *any Federal or State* court).

S. Ct. 1732, 1736 (1994) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citations and internal quotations omitted). Had Congress intended Section 924(c) to apply to state sentences, it would have used the precise language in Sections 3564(b) and 3624(e) in amending Section 924(c). The contrast between Section 924(c) and these two other provisions could not be more striking and demonstrates that Congress did not intend Section 924(c) to have the same sweep as Sections 3564(b) and 3624(e).

Under the Government's interpretation of Section 924(c), the language in the Crime Control Act of 1984 and Title 18 that specifically refers to state law—particularly the use of the phrase "federal or state" to modify and clarify the term "any" in numerous statutes—is mere surplusage, contrary to the well-established canon of statutory construction that courts should be "reluctan[t] to interpret a statutory provision so as to render superfluous" the language in related enactments. *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990); see also *Ratzlaf* v. *United States*, 510 U.S. 135, ——, 114 S. Ct. 655, 659 (1994) ("Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."). Indeed, that canon of statutory construction should apply with particular force in this case because Congress's consistent and longstanding practice is to use the language that the Government's interpretation of Section 924(c) renders superfluous.

In sum, Congress's failure specifically to express an intention to extend the concurrent sentencing prohibition to sentences imposed by state courts for violations of state law demonstrates that Congress did *not* intend for

Section 924(c) to apply to state terms of imprisonment. In light of the specific references to state law in other sections of the Crime Control Act of 1984 and in related provisions of Title 18, Congress's "silence" with respect to state law in Section 924(c) "speaks volumes." *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994). At a minimum, this contextual evidence establishes that the language of Section 924(c) is ambiguous, and that it is necessary and appropriate to consult additional sources for guidance, such as the legislative history. See *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984) (this Court looks "to the legislative history if the statutory language is unclear.")

B. The Legislative History Of Section 924(c) Confirms That The Statute Only Applies To Terms Of Imprisonment Imposed Under Federal Law.

The Senate Committee Report accompanying the 1984 amendments to Section 924(c) confirms that Congress did not intend that statute to apply to state terms of imprisonment. See S. Rep. No. 98-225, 98th Cong., 2d Sess. 312, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490 (the "Committee Report").[4] This intent is evident both in what the Committee Report says and in what it does not say.

The 1984 amendments are central to the analysis because prior to them, Section 924(c) unequivocally did *not* apply to state terms of imprisonment. The pre-1984 version of Section 924(c) only restricted the sentence under it from being served concurrently with "any term imposed for the underlying felony," which was by statutory definition a federal offense. *Simpson* v. *United States*, 435 U.S. 6, 14 n.9 (1978). Thus, if (as the Government argues) the statute was expanded to *state* prison terms,

[4] This Court repeatedly has recognized that "the authoritative source for legislative intent lies in the Committee Reports on the bill." *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986); *Garcia* v. *United States*, 469 U.S. 70, 76 & n.3 (1984).

that change could only have been accomplished through the 1984 amendments, which expanded the concurrent sentencing prohibition to encompass "any other term of imprisonment including" the underlying predicate crime. U.S. Brief 22.

The Committee Report, however, which discusses in detail the purposes of the amendments to the statute, makes no mention of an intent to expand the concurrent sentencing prohibition to state prison terms. Instead, the Committee Report explains that the purpose of the amendments was to correct certain "drafting problems" and to overrule "interpretations of the section in recent Supreme Court decisions" that had reduced the provision's effectiveness. 1984 U.S.C.C.A.N. 3490. Specifically, the Committee Report notes that the pre-amendment language was "ambiguous" as to how first violations should be treated, *id.*, and that the Supreme Court had negated the use of the section where the statutes defining the underlying federal offenses already provided for their own enhanced punishment if the violations were committed by means of a dangerous weapon, *id.* at 3490-91 (citing *Simpson* v. *United States*, 435 U.S. 6, 10 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980)). The aim of the amendments, according to the Committee Report, was "to overcome the problems with the present [sections]" of the statute. *Id.* at 3491.[5]

[5] The Government argues that Congress's express desire to require consecutive sentences even where the underlying federal crime itself carries an enhanced punishment for use of the same firearm indicates that it would not have intended a more "lenient" result where the "underlying" offense has been the subject of a state prosecution. U.S. Brief 24-25. The flaw in this argument is that it proves too much. Under the Government's expansive interpretation of Section 924(c), the firearm sentence must be consecutive to "any" state term of imprisonment, including one involving a nonviolent offense that has nothing to do with the underlying conduct. Accordingly, even though Congress intended consecutive sentences (and indeed thought them particularly appropriate) for

Significantly, however, the Committee Report does not identify the application of the pre-1984 statute only to federal prison terms as a "problem," or suggest that the 1984 amendments were designed to expand the statute to encompass state prison terms. The legislative history is wholly silent with respect to the purported expansion of the statute to *state* sentences that the Government argues Congress intended to address in the amendments. This silence is compelling evidence that Congress did not intend to change pre-1984 law by expanding the section to cover state prison terms. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) ("[S]ilence [in legislative history] . . . while contemplating an important and controversial change in existing law is unlikely."); see also *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613-14 (1991) (If amendment to National Labor Relations Act had been intended to make "important" change, the Court "would expect to find some expression of that intent in the legislative history.").

Moreover, another passage in the legislative history affirmatively indicates that Congress did *not* intend to expand Section 924(c) to state prison terms. The Report states that "the Committee intends that the mandatory sentence under the revised subsection 924(c) be served *prior to the start* of the sentence for the underlying or any other offense." 1984 U.S.C.C.A.N. 3492 (emphasis added). This language indicates that Congress could not have intended for Section 924(c) to apply to preexisting state sentences, since it is impossible for a defendant to *begin* serving a Section 924(c) sentence *prior* to a state sentence that he is already serving. Thus, Congress did not contemplate that Section 924(c) would apply to the situation presented in this case, *viz.*, where respondents were serving state sentences at the time of their federal

certain "extremely dangerous [federal] offenses," 1984 U.S.C.C.A.N. 3490, that carry their own firearms enhancements, it does not follow that Congress likewise intended consecutive sentences where the defendant is serving a state sentence for forgery or embezzlement.

sentencing. It is simply impossible to reconcile the Government's position in this case with the Senate Committee's express intent regarding sentence order.[6]

C. Since Congress Did Not Make A "Clear Statement" In Section 924(c) That It Intended To Preempt State Sentencing Law, Or To Fundamentally Change The Federal-State Balance In The Enforcement Of Criminal Law, This Court Should Not Adopt A Construction Of The Statute That Would Have Those Effects.

The absence of any indication in the text of Section 924(c) that Congress intended for the statute to apply to state sentences should be dispositive in this case for the additional reason that Congress failed to satisfy applicable "clear statement" requirements. This Court consistently has held that it will not adopt a construction of a federal statute that preempts state law unless such displacement was the "clear and manifest" purpose of Congress. *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum*, 485 U.S. 495, 500 (1988) (citations omitted). Moreover, even where a statute does not actually preempt state law,

[6] The Government suggests that the sentence order specification in Section 924(c)'s legislative history should not be given any weight in this case because the specification also could suggest that Congress did not intend for Section 924(c) to apply to preexisting *federal* sentences. U.S. Brief 17-18. The question of Section 924(c)'s applicability to prior *federal* sentences is not before the Court. Even if it were, the holistic approach requires that each question of statutory interpretation involve analysis of the language of the statute in light of relevant contextual evidence. While legislative history may be probative if the text is ambiguous, it is ultimately the language of the statute that must be construed. In this case, which raises significant federalism concerns, the sentence order specification in the legislative history is highly relevant because the text of the statute is ambiguous and because the specification precludes the Government's reading of the statute. It does not follow, however, that this Court would have to give the legislative history the same weight—or, indeed, any weight at all—in resolving other statutory interpretation questions that do not raise the same fundamental concerns for state prerogatives.

this Court has imposed a similar clear statement requirement where Congress seeks to expand the role of the federal government vis-a-vis the states in an area of traditional state responsibility, such as enforcement of criminal laws. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 349-50 (1971). The clarity in Congress's enactments cited previously, which identify precisely when Congress intends for state law to be affected by a federal criminal statute, demonstrates that Congress understands and follows these fundamental "clear statement" principles. Thus, Congress's decision to include express references to state law in these other statutes is not the product of whim, but is a direct response to the legal standards established by this Court. Congress's compliance with clear statement requirements in these other statutes reinforces the already strong inference that Congress's choice of language not specifically referencing "state law" plainly reveals an intent to restrict Section 924(c) to federal sentences.

In any event, the Government's construction of Section 924(c) has both the effect of preempting state criminal law in certain circumstances and of altering the traditional federal-state balance in enforcement of criminal laws. Congress, however, did not clearly express an intent in Section 924(c) to accomplish either of those results. Accordingly, pursuant to the clear statement requirements, this Court should not adopt an interpretation of the statute that has those consequences.

When analyzing whether a federal statute preempts state law in an area of traditional state responsibility, such as the enactment and enforcement of criminal laws,[7]

[7] *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1720 (1993) ("The States possess primary authority for defining and enforcing the criminal law") (citations and internal quotations omitted); *United States* v. *Bass*, 404 U.S. 336, 350 (1971) (narrowly construing federal criminal statute to avoid intruding on "traditional state criminal jurisdiction").

this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 500 (citations and internal quotations omitted); see also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (plurality); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This "clear statement" requirement safeguards fundamental principles of federalism by ensuring that the federal statute does not "impinge[] upon or pre-empt[] the States' traditional powers" where Congress did not clearly intend that result. *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) (citations omitted). Accordingly, in the absence of a manifestly clear purpose to preempt state law, a federal statute is interpreted so that it does not interfere with the operation of state law, particularly in an area of traditional state responsibility.

The Government's interpretation of Section 924(c) would preempt and interfere with the operation of state sentencing law in some circumstances. Consider, for example, a case where the order of the federal and state proceedings is the reverse of the sequence in this case, *i.e.*, a case where a defendant is tried, convicted and sentenced on federal charges, including 924(c), and subsequently is tried and convicted in state court on state charges, either related or unrelated to the federal charges. Under the Government's reading of Section 924(c)—which provides that the sentence under that section "*shall* [*not*] run concurrently with any other terms of imprisonment," including a state prison term—the state court would have to impose the state sentence consecutively to the Section 924(c) sentence, regardless of whether state law allowed or dictated a different result.[8] For example,

[8] Several states, by statute, expressly give state courts discretion to impose state sentences concurrently with preexisting federal sentences. *See, e.g.*, Ark. Code Ann. § 5-4-403(b); Cal. Penal Code § 669; Fla. Stat. Ann. § 921.16(2); Ill. Ann. Stat. ch. 730 § 5/5-

had the respondents been tried first in federal court, rather than vice versa, the state court would have been bound under the Government's reading of Section 924(c) to impose the state sentences consecutively to the federal sentences, even though the state judge would have had the discretion to impose concurrent sentences under state law. *State* v. *Mayberry*, 643 P.2d 629, 632 (N.M. Ct. App. 1982) (common law rule in New Mexico is that two or more sentences are to be served concurrently, although trial court has discretion to require consecutive sentences).

Under this Court's decisions, such preemption of state sentencing authority should not be permitted in the absence of a clear statement in the statute that such preemption was intended. Section 924(c) contains no such statement. There is no express preemption clause in the statute.[9] Nor, as discussed above, is there any indication in the statute that it applies to state terms of imprisonment. Indeed, the statute is wholly silent with respect to state law. Accordingly, there is no indication in the statute—much less a clear statement—that Congress intended to preempt state sentencing law.

8-4(a) (Smith-Hurd 1996); Kan. Stat. Ann. § 21-4608(h); Maine Rev. Stat. Ann. tit. 17-A, § 1256(7); Mo. Rev. Stat. § 558.026(3); N.Y. Penal Law § 70.25(4) (McKinney 1996); Ohio Rev. Code Ann. § 2929.41(A) (Baldwin 1996); Or. Rev. Stat. § 137.370(5); Va. Code Ann. § 19.2-308.1; Wis. Stat. Ann. § 973.15(3). Many such statutes specify that the sentences shall run concurrently, unless the trial court specifies otherwise. *See, e.g.*, Ark. Code Ann. § 5-4-403(b); Ill. Ann. Stat. ch. 730 § 5/5-8-4(a); Or. Rev. Stat. § 137.370(5).

[9] While the statute expressly provides that it applies "[n]otwithstanding any other provision of law," that clause is not a preemption clause because it does not express Congress's intent to displace *state* law. *Cf., e.g.*, the preemption clauses of ERISA, 29 U.S.C. §1144(a) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan") and of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1) (prohibiting the States from enforcing any law "relating to rates, routes, or services" of any air carrier) (since repealed).

The absence in Section 924(c) of language addressing state law is particularly striking for preemption purposes in light of the other sections of Title 18 and other provisions in the Comprehensive Crime Control Act of 1984 that expressly reference state law. These other statutes provide precise models for how Congress could, and presumably would, have worded Section 924(c) had it intended for that section to preempt state law. In particular, the provisions of the Comprehensive Crime Control Act of 1984 relating to probation and supervised release provide precise blueprints for how Congress would have worded Section 924(c), if it had intended to displace state law concerning the imposition of concurrent or consecutive sentences.[10] Those provisions, by their terms, expressly require that sentences of probation and supervised release imposed by state courts be served concurrently with the federal sentences—whether the state sentences are imposed before or after the federal sentences. Accordingly, those provisions necessarily displace state court sentencing discretion. Congress's failure to use similar "clear statement" language in Section 924(c) can only mean that it did not intend for that statute to preempt state sentencing law. At a minimum, the Court should not fill the void left by Congress.[11] Accordingly,

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[10] *See* 18 U.S.C. § 3564(b) ("A term of probation runs concurrently with *any Federal, State, or local* term of probation, supervised release, or parole for another offense to which the defendant is subject *or becomes subject* during the term of probation.") (emphasis added); 18 U.S.C. § 3624(e) ("The term of supervised release . . . runs concurrently with *any Federal, State, or local* term of probation or supervised release or parole for another offense to which the person is subject *or becomes subject* during the term of supervised release.") (emphasis added).

[11] Congress should have been particularly aware of the need for precision when drafting the 1984 amendments to Section 924(c), inasmuch as the main purpose of the amendments was to overturn this Court's decisions in *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), which narrowly construed *that very statute* on the ground that it was ambiguous with respect to critical sentencing issues.

the Government's interpretation of Section 924(c) should be rejected.

Even if the Government's interpretation of Section 924(c) does not have the effect of preempting state law, it should be rejected because it violates the independent principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in enforcement of criminal law. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). This principle is rooted in concepts of federalism, which dictate that courts should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* The clear statement requirement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*

In *Bass*, the clear statement principle was invoked as a basis for narrowly construing a substantive federal criminal statute that "render[ed] traditionally local criminal conduct a matter for federal enforcement." *Id.* at 350. *Bass*'s clear statement principle is applicable in this case because Section 924(c) not only creates a federal crime that overlaps state criminal jurisdiction, but (under the Government's view) also requires that the sentence for that crime be served consecutively to the sentence for *any* state crime. Where the state sentence is based on the same course of conduct as the Section 924(c) conviction —a scenario that the Government admits may arise frequently [12]—the effect of the concurrent sentencing prohibition is to increase the term of incarceration for "traditionally local criminal conduct." Thus, under the Government's interpretation of Section 924(c), that statute is a

[12] As the Government itself points out, "the bulk of conduct covered by Section 924(c) . . . would also be covered by, and *would be frequently prosecuted under*, state criminal statutes." U.S. Brief 14 (emphasis added).

mechanism by which the federal government, if it chooses to bring charges, can supplement state penalties for certain violent conduct, even where the state already imposes enhanced penalties for use of a firearm.[13]

Where the state sentence is *not* based on the same course of conduct as the Section 924(c) conviction, the prohibition on concurrent sentences necessarily affects the federal-state balance by preempting state sentencing law that would permit concurrent sentences and by displacing the federal courts' usual discretion to impose concurrent sentences.[14] By precluding concurrent sentences in cases where state and federal courts would otherwise impose them, Section 924(c) effectively increases the potential punitive consequences of all state convictions, including convictions for non-violent offenses that have no nexus to the penological objectives of Section 924(c).

While Congress has the authority to alter the traditional federal-state balance in criminal enforcement by supplementing state penalties and by prohibiting concurrent sentences, the clear statement standard in *Bass* requires that courts not presume such alteration unless Congress has "convey[ed] its purpose clearly." As discussed above, Congress has not conveyed such a purpose clearly in Section 924(c). In contrast to many other federal criminal statutes, there is no indication in the statute that Congress

[13] Ordinarily, federal courts faced with successive federal and state prosecutions arising out of the same course of criminal conduct apply United States Sentencing Guideline § 5G1.3(b), which provides that federal and state terms of imprisonment based on the same course of conduct *should run concurrently*. *See* Application Note 2 to U.S.S.G. § 5G1.3. Under the Government's construction of Section 924(c), that statute necessarily displaces the Guidelines.

[14] 18 U.S.C. § 3584(a), which also was enacted as part of the Comprehensive Crime Control Act of 1984, provides that "[i]f . . . a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively."

meant to affect state sentencing law. Accordingly, this Court should reject the Government's interpretation of Section 924(c), which encroaches on state prerogatives in enforcement of criminal laws.

D. The Rule Of Lenity Requires That Section 924(c) Be Interpreted Most Favorably To Respondents.

The foregoing discussion of the text of Section 924(c), the legislative history, and the absence of a clear purpose in the statute to preempt state law or alter the federal-state balance demonstrates that Section 924(c) only applies to federal terms of imprisonment. At the very least, however, it demonstrates that Congress's intent is unclear, *i.e.*, that the Government cannot establish that its interpretation of Section 924(c) is unambiguously correct.

In these circumstances, where there is an ambiguity with respect to the ambit of the penalties imposed by a criminal statute, the rule of lenity requires that Section 924(c) be interpreted in respondents' favor. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *Simpson* v. *United States*, 435 U.S. 6, 14-15 (1978); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). The policy of lenity:

> means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

Ladner v. *United States*, 358 U.S. 169, 178 (1958). Thus, "where text, structure, and history fail to establish that the Government's position is unambiguously correct —[the Court applies] the rule of lenity and resolve[s] the ambiguity in [a criminal defendant's] favor." *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 (1994) (citing *United States* v. *Bass*, 404 U.S. 336, 347-49 (1971)).

This case provides the paradigmatic example of a situation where the rule of lenity should be applied. At a minimum, respondents' analysis of the text and legislative history of the statute, as well as clear statement principles, establishes that the Government's position in this case is not unambiguously correct. Accordingly, in order to avoid "more than doubl[ing] the custodial price," 65 F.3d at 821, that respondents will have to pay where Congress did not clearly intend that result, the rule of lenity dictates that Section 924(c) should be interpreted in respondents' favor. Thus, Section 924(c) should not be construed as requiring that respondents' lengthy state terms of imprisonment, which already incorporate state firearm enhancements, be served consecutively to the sentence under that statute.[15]

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[15] Respondents Gonzales, Hernandez-Diaz and Perez are, respectively, currently serving sentences of thirteen years, fourteen and one-half years, and seventeen years in the New Mexico Penitentiary system. These sentences reflect enhancements under Section 31-18-16 N.M.S.A., which provides that the sentence for a non-capital felony is increased by one year if a firearm was used in the commission of the offense.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

Of Counsel:
CARTER G. PHILLIPS
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

EDWARD BUSTAMANTE *
1412 Lomas Blvd., NW
Albuquerque, NM 87104
(505) 842-0392
Counsel for Respondent Miguel Gonzales

ANGELA ARELLANES
P.O. Box 1784
Albuquerque, NM 87103
(505) 247-2417
Counsel for Respondent Orlenis Hernandez-Diaz

ROBERTO ALBERTORIO
P.O. Box 90351
Albuquerque, NM 87199
(505) 768-3917
Counsel for Respondent Mario Perez

* Counsel of Record

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